JD-101-97
San Juan, PR

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GENERAL SECURITY SERVICES CORPORATION

and Case No. 24-CA-7519

EMILIO SANTIAGO, An Individual

Ismael Rodriguez, Esq., for the General Counsel.
Idelfonso Lopez, Esq., for the Respondent.

DECISION

Statement of the Case

GEORGE ALEMÁN, Administrative Law Judge. Pursuant to a charge filed by Emilio Santiago on September 6, 1996,[1] the Regional Director for Region 24 of the National Labor Relations Board (the Board) issued a complaint on November 29, alleging that General Security Services Corporation (the Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by issuing Santiago a disciplinary warning because he "joined and/or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities."[2] By answer dated December 9, the Respondent admitted issuing Santiago a warning but contends that it was done for legitimate, nondiscriminatory reasons, and denied having committed any unfair labor practices.

A hearing in this matter was held before me in Hato Rey, Puerto Rico on April 9, 1997, during which all parties were afforded full opportunity to appear, to call and examine witnesses, to submit oral as well as written evidence, and to argue orally on the record. On the basis of the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after considering briefs filed by the General Counsel and the Respondent, I make the following

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[1] All dates are in 1996, unless otherwise indicated. Reference to General Counsel or Respondent exhibits are herein identified respectively as "GCX" or "RX", followed by the exhibit number. Reference to record testimony is cited as "Tr." followed by the page number(s).

[2] The General Counsel, having given the Respondent one week's notice of its intent, moved to amend the complaint at the start of the hearing to allege that one Jorge Diaz, a Court Security Coordinator employed by the United States Marshals Service (USMS) in Puerto Rico, was at all times material herein Respondent's agent, and to add a Section 8(a)(3) allegation that the Respondent unlawfully refused to expunge the warning from Santiago's personnel file. The General Counsel also moved to further amend the complaint just prior to the close of the hearing to allege a Section 8(a)(4) violation based on an admission by Respondent's contract manager, Eddie Villafañe, that he declined to remove the warning from Santiago's file because Santiago had filed a charge with the Board. The General Counsel's motions to amend were granted (see GCX-2; Tr. 151, 157-158).

Findings of Fact

I. Jurisdiction

The Respondent, a Minnesota corporation, maintains an office and place of business in San Juan, Puerto Rico where it is engaged in the business of providing security services, through the USMS, to the federal courts for the District of Puerto Rico. During the past 12 months, a representative period, the Respondent, in the conduct of its operations, derived gross revenues in excess of $500,000, and during the same period provided security services valued in excess of $50,000 to the U.S. Department of Justice at the federal district courts in Puerto Rico. The complaint alleges, the Respondent admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3]

II. Alleged Unfair Labor Practices

A. Factual Background

The Respondent, as noted, is under contract with the USMS to provide court security officers (CSOs) for the federal courts in Puerto Rico. One such CSO, alleged discriminatee Emilio Santiago, has been employed in that capacity since about 1992. In early 1996, Santiago began lending his support to the Union as it began a drive to organize Respondent's CSOs. The Union's drive proved successful, for after petitioning the Board for an election, one was held on May 8 which the Union won by a vote of 42 to 5 (see GCX-3).

While admitting that he was not a Union leader, did not solicit cards for the Union, and did not serve as an election observer, Santiago did testify, without contradiction, that he was one of the first CSOs to sign a card authorizing the Union to petition for an election, that he attended Union meetings, and that he and other co-workers often gathered in the parking lot and cafeteria of the Federal Building in Hato Rey, Puerto Rico to discuss the problems they were having with Respondent relating to bonuses and sick leave, and why a union would be beneficial to them (Tr. 38).[4] Santiago also testified that a few days before the election, while at the Old San Juan building, he expressed his concerns about the Company's policies on bonuses and sick leave to supervisor Luis Soto, and mentioned that he and other employees were thinking of forming a union because the Respondent had failed to address these issues. Santiago also told another supervisor, Torres, that he and other supervisors stood to gain if employees succeeded in obtaining bonuses.

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[3] Although the Respondent's answer denies that Government Security Officers of America, Local 72 (herein the Union), is a labor organization within the meaning of Section 2(5) of the Act, the record evidence makes clear that the Union has won a Board-conducted election. The Respondent's statement in its posthearing brief (p. 7) that no postelection issues were raised in the representation hearing suggests implicitly that the Union's status as a Section 2(5) labor organization was never challenged and that the Union has apparently been certified by the Board. Given these circumstances, I find that the Union is indeed a labor organization as defined by the Act. Resolution of this question is not, in any event, necessary to resolve the unfair labor practice allegations in the complaint.

[4] Santiago was often assigned to provide security services at the Federal Building in Hato Rey, as well as in the old federal courthouse, herein referred to as the "Old San Juan" building. The Old San Juan building houses the chambers and offices of federal court Judge Torruela.

Another CSO, Emilio Hernandez, also testified to having a conversation with supervisor Soto in early June that involved the Union. He recalled that in early June, while working at a security site in the Chase Bank building, he was told that Soto wanted to see him. Later that day, during his lunch hour, he met with Soto and was informed he was being transferred from the Chase building to the Federal building because of his excessive absenteeism. Unhappy with the transfer, Hernandez stated he was going to report the matter to the Union. In response, Soto stated that because the employees had decided to unionize, the Respondent would be taking stronger disciplinary measures against them. When Hernandez told Soto he was not up to discussing such matters, and was simply going to file his report with the Union, Soto replied that he could go to the Union or do whatever he wanted to, but that as there was nothing written in "black and white," he did not recognize the Union (Tr. 25-26). Hernandez was officially transferred to the Federal building on June 14.[5]

The incident which Respondent claims gave rise to the warning occurred on June 14. That day, Santiago and CSO Manolin Berrios were assigned to security duty at the Old San Juan Building. Security arrangements for the Old San Juan Building called for two security officers to be posted 24-hours a day at two locations. One location, referred to as "P-1", is a large gate on the south side of the building, through which all guests and tenants of the building must enter and exit. The other site, known as station "69", is essentially a control room located in a hallway inside the building approximately 75 feet from the P-1 gate. Station "69" houses six monitors from which the assigned CSO is able to observe areas in and adjacent to the building, such as the parking lot, the passageway leading to the judge's chambers, and the hallway from the control room to the P-1 gate.

On the day in question, Santiago worked the 2:00 PM-10:00 PM shift, and was assigned to station "69", the control room. Berrios was stationed at the P-1 gate. At approximately 4:00 PM, Santiago began his 45-minute lunch break. Although he could have taken his lunch break away from the Old San Juan building, e.g., at a local restaurant, Santiago that day chose to buy

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[5] Despite its obvious significance to the case, the Respondent made no effort to challenge Hernandez' testimony as to what Soto told him, or offered other testimony to contradict him. Rather, Respondent's cross-examination of Hernandez was limited to establishing Hernandez' poor attendance record, and challenging his credibility by showing his inability to recall if his conversation with Soto occurred in 1995 or 1996. While Hernandez seemed confused on direct and cross-examination as to when the conversation occurred, on redirect examination by the General Counsel Hernandez credibly recalled the conversation occurring after the May, 1996 Board election. Hernandez' initial lack of recall in this regard, nor the fact that he may have had a poor attendance record, warrants rejection of his otherwise uncontradicted and, in my view, reliable testimony.

The Respondent also did not challenge Hernandez' or Santiago's characterization of Soto as a supervisor. Given their undisputed and mutually corroborative testimony in this regard, and Hernandez' testimony that Soto effectively disciplined him by transferring him from one site to another, I find that Soto was at all times material herein a supervisor within the meaning of Section 2(11) of the Act. *McGaw of Puerto Rico*, 322 NLRB No. 73, slip op. at p. 7 (1996). As a supervisor, Soto would have been favorably disposed to the Respondent's position. The Respondent, however, did not call Soto as a witness to counter Hernandez' or Santiago's testimony, and does not claim that he was unavailable to testify. Accordingly, I draw an adverse inference from his failure to testify, and find that had he done so, his testimony would not have been favorable to the Respondent. *Eaton Technologies*, 322 NLRB No. 148, slip op. at p. 17 (1997).

his lunch and eat at the job site.[6] One-half hour into his lunch break, Berrios called him to say he was going to the restroom. Santiago told Berrios he would be right out to relieve him at the gate. However, within a minute or so, as he was putting his food aside and preparing to go to the gate, Santiago noticed Berrios hurrying past him towards the restroom. Santiago immediately glanced at the monitors and saw Villafañe standing at the P-1 gate talking to a messenger.[7] Santiago immediately headed to the P-1 gate where Villafañe and the messenger were standing. Santiago testified that he and Villafañe did not speak to each other during this incident. Berrios returned soon thereafter and began talking with Villafañe. While they talked, Santiago led the messenger back to the control room to sign for the package. By the time Santiago returned to the gate to let the messenger out, Villafañe had departed. Santiago then asked Berrios what he and Villafañe had discussed. Berrios explained that he had told Villafañe that he urgently needed to use the restroom, and was responsible for the post being left unattended because "he had not waited for me [Santiago] to come out" and relieve him (Tr. 49). Villafañe purportedly replied, "okay, fine" and left. Santiago's testimony as to what Berrios said he told Villafañe was not challenged by Villafañe. In fact, Villafañe admits that on his return to the gate, Berrios told him, "I'm supposed to be out here." (Tr. 141). Villafañe claims that when he tried to explain to Berrios the importance of not leaving his post unattended, Berrios indicated he did not want to discuss it, at which time Villafañe simply "backed off."[8]

On June 19, Santiago was at the Federal building retrieving his firearm from the USMS gun locker room when Villafañe, accompanied by Diaz, asked that he go with them to Diaz' office. Once there, Villafañe, according to Santiago, handed him a written warning (GCX-4) stating, "take this and sign it, it's nothing, it's just, since you were there with Manny Berrios working together, its just to cover the situation with Manny Berrios." (Tr. 51). The letter explains Santiago's alleged misconduct as follows:

> "According to the information received, it is clear that on June 14, 1996 you abandoned your post without taking the necessary steps to avoid having the post unattended. I understand that you where [sic] not working alone, CSO Manolin Berrios was also assigned to the Old San Juan Post, therefore, it was your responsibility to ensure that the post was covered."

Although handed to him by Villafañe, the warning letter was prepared on USMS stationery and is signed by Diaz. Apparently seeking to downplay its involvement in the issuance of the warning, the Respondent in its posthearing brief contends that Villafañe simply filed a routine report with Diaz, that it was the latter who decided to issue the warning, and that Villafañe merely concurred with that decision. However, Villafañe's own testimony suggests that he was the individual responsible for the warning. Thus, when asked by Respondent's own counsel "why the warnings were given to Santiago," Villafañe responded, "Because ***I felt*** that he was

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[6] CSOs set their own lunch/dinner hours. The Respondent concedes there was nothing improper in Santiago taking his lunch break when he did (Tr. 148).

[7] Earlier that day, Santiago apparently had arranged for a messenger to deliver a package to him at the Old San Juan building.

[8] The Respondent's contention in its posthearing brief (p. 4), that Villafañe on June 14, "explained to the employees that the post had been neglected, and that anyone - not just himself and the messenger - could have easily made their way to the [judge's] chambers", finds no support in the record. A review of Villafañe's testimony reveals that no such remarks were made. Nor is there anything in Villafañe's or Santiago's testimony to indicate, as the Respondent's brief further contends (p. 4), that Santiago mentioned to Villafañe on June 14, that he had been in the "CSO room taking a late lunch break."

also responsible for not having secured the area." (Tr. 130). Further, when asked by the General Counsel if he had issued the warning without first finding out if Berrios had requested Santiago to relieve him, Villafañe did not disclaim responsibility for the warning, but instead answered, "What I did was what I say and the way I acted; that was it." (Tr. 143). Given the above testimony by Villafañe, I find that despite being signed by Diaz, the warning was issued at Villafañe's insistence. Clearly, if Diaz was solely responsible for the warning, then he would have had sole authority to rescind it if he so desired. Villafañe, however, testified that Diaz could not unilaterally rescind the warning without his approval. Accordingly, I find that Villafañe was the pivotal player in the issuance of the warning, and that for reasons not made clear on this record, Diaz was asked to author the written warning.[9]

When presented with the warning, Santiago refused to sign it claiming it was unfair because he had been on his lunchbreak when the gate was left unattended, and that Berrios, not he, had been assigned to guard the P-1 gate. Diaz, according to Santiago, responded that as he and Berrios were working together at the same facility, both were responsible for the facility's overall security, making Santiago as guilty as Berrios for the incident. Santiago at that point informed Villafañe and Diaz that he would thereafter take his breaks away from the facility so as to avoid such problems in the future. Villafañe admits seeing Santiago with food in his hand when he came to the gate from the monitor room. He did not, however, inquire if Santiago was on his lunch break. Nevertheless, Villafañe claims he explained to Santiago that he had to give him a warning (regardless of whether he was on break) because he was at the facility when Berrios left his post. After being initialed by Diaz, the warning was placed in Santiago's personnel file.

In addition to the warning, a counseling letter was prepared by Villafañe and, according to the latter, given to Santiago to read and sign stating he had been counseled pursuant to the "U.S. Marshals [Diaz'] memorandum dtd June 18, 1996" (RX-2). Villafañe claims Santiago declined to sign the counseling letter. Santiago, on the other hand, denied ever having seen the Counseling letter.

Villafañe agrees that Santiago protested the warning essentially for the reasons claimed by him. He further conceded that it was indeed Berrios' responsibility to remain at his post until relieved, and explained that if no relief was available, Berrios could simply have locked the gate and alerted Santiago so that the latter could monitor the gate from the control room, and be prepared to open the gate in the event someone needed to exit the facility during Berrios' absence. However, adding a somewhat different spin on why Santiago received the warning, Villafañe claims that as one of the more senior CSOs, Santiago, on seeing Berrios leave his post, should have assumed responsibility for telling Berrios to stay put until relieved. Santiago, according to Villafañe, "should have responded or called [Berrios'] attention to stay there until he got properly relieved." (Tr. 130). Villafañe admits that at no time prior to the warning did he ask Santiago if he had said anything to Berrios about leaving his post, or inquire of Berrios whether he had asked Santiago to relieve him. In fact, Villafañe first heard Santiago's version of the incident on June 19, as the warning was being issued.

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[9] While my finding that Villafañe was responsible for the issuance of the warning makes it unnecessary to address the issue of whether Diaz was an agent of the Respondent, evidence of record showing that Diaz, in conjunction with Villafañe, was responsible for overseeing Respondent's operations and for exercising authority over CSOs, would support a finding that at all relevant times herein, Diaz was in fact an agent of the Respondent as defined by Section 2(13) of the Act.

Santiago testified that about a week after receiving the warning he was at the Federal building when Diaz approached him and admitted that the warning had been unfair, and that he was willing to rescind the warning if Santiago would prepare a letter explaining what had occurred on June 14. Diaz, according to Santiago, agreed to destroy the warning in his presence on receipt of the letter. Santiago agreed to do so. Santiago's testimony in this regard is partially corroborated by Villafañe who testified Diaz told him he had asked Santiago to prepare a written account of what "actually took place at the Old San Juan Building" (Tr. 151). Diaz, according to Villafañe, did not consult with him before asking Santiago to prepare his written statement.

Santiago thereafter prepared a handwritten letter in Spanish detailing the events of June 14, and gave it to Berrios who agreed to translate it into English and type it for him. Santiago received the typewritten, translated letter from Berrios in late July (GCX-5). In addition to describing the June 14 incident, the letter included a statement expressing Santiago's belief that the warning was "another form of intimidation, which has surfaced since May 8th, 1996, the date that myself and other Court Security Officers voted to be represented by the Union."

Santiago recalled that after receiving the typewritten letter from Berrios, he and Villafañe got into a minor spat when he asked Villafañe to remove the warning from his file to avoid any problems with other employees and the Union. When Villafañe refused to do so, Santiago decided to hand-deliver the letter to Diaz. Unable to find Diaz, Santiago gave the letter to Cesar Torres, a former CSO coordinator, who accepted delivery for Diaz, and gave Santiago a signed receipt for the letter (GCX-6).[10]

Villafañe recalled a conversation with Diaz in which the latter asked him to review the warning issued to Santiago one more time to see what could be done because he (Diaz) was considering removing the warning from Santiago's file. Villafañe admits he advised Diaz not to remove the warning because "the [unfair labor practice] case has already been filed, the complaint has been filed with the National Labor Relations Board; I don't think it should be pulled because its already been filed." (Tr. 151). Based on Villafañe's advice, the warning was left in Santiago's file.

B. Discussion and Findings

1. The Section 8(a)(3) and (1) Allegations

[10] Santiago testified that some two months later, Diaz informed him that he could not accept the explanatory letter because of the comments made therein by Santiago about how he had been mistreated because of his union involvement, and that the language would have to be deleted before he would accept the letter. While Santiago was generally a credible witness, his testimony as to whether Diaz asked him to delete a select portion of his letter pertaining to the Union was somewhat evasive. Thus, while initially claiming that Diaz specifically told him to take out such language, after much hesitation he conceded that Diaz made no such request, and that he [Santiago] simply assumed this to be the case. Accordingly, while I find plausible Santiago's testimony that he and Diaz discussed the letter, I find, in light of Santiago's somewhat reluctant admission, that Diaz at no time asked him to remove from the letter the language pertaining to the Union. However, the fact that I do not credit Santiago's ambiguous testimony in this regard does not render suspect or unreliable his testimony on other matters, for nothing is more common than for a trier of fact to believe some, but not all, of a witness' testimony. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

The General Counsel, as noted, contends that the Respondent's issuance of the June 18, warning, and its denial of Santiago's subsequent request that it be removed from his file, violated Section 8(a)(3) and (1) of the Act. Section 8(a)(3) and (1) prohibits an employer from "discriminating in regard to tenure of employment or any term or condition of employment to discourage membership in any labor organization." An employer violates Section 8(a)(3) and (1) when it takes adverse personnel action, such as issuing a disciplinary warning, in response to an employee's involvement in union or other protected activity. *Astro Tool & Die Corp.*, 320 NLRB 1157 (1996). While there is no disputing that Santiago received a written warning, the parties disagree on what motivated its issuance, with the General Counsel, as noted, contending that it was discriminatorily motivated by Santiago's Union activity, and the Respondent defending that it lawfully issued the warning because of Santiago's failure to cover the P-1 station left unattended by Berrios when the latter took a bathroom break.

The analytical framework for deciding this issue is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir., 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the burden of proof rests initially with the General Counsel to make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision to issue the warning. This burden is met upon a showing by the General Counsel that prior to the adverse action being taken, the affected employee was engaged in Union or other protected activity, and that the employer was aware of such activity and harbored union animus. The lack of any direct evidence of animus will not necessarily preclude the establishment of a prima facie case, for the Board may infer an unlawful motive from the record as a whole, and will consider evidence such as suspicious timing, false reasons given in defense, and a failure to adequately investigate the alleged misconduct, to support such an inference. *Holsum Bakers of Puerto Rico*, 320 NLRB 834, 837 (1996). Once General Counsel makes out a prima facie case, the burden shifts to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct. An employer does not satisfy its burden in this regard by simply stating a legitimate reason for the action taken, but must instead persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of any protected activity. *T & J Trucking Co.*, 316 NLRB 771 (1995).

The General Counsel has produced sufficient credible evidence to satisfy the elements of a prima facie case. Thus, Santiago's testimony, which I find credible, that he signed a Union card, attended Union meetings, and discussed with other employees the need for a Union, is uncontested and clearly establishes his involvement in Union or other protected activities. While admitting that Santiago engaged in the above activities, the Respondent nevertheless characterizes them as very limited in nature, and suggests that the General Counsel has fallen short of proving a prima facie case by failing to show that Santiago had been a leader or an active participant in the Union's organizational drive (Resp.'s Brief, p. 9). Contrary to the Respondent, the protections afforded employees under the Act are not restricted to those individuals bold enough to assume leadership roles in a Union's organizational campaign, but rather extends to any employee who engages in protected concerted activity. In this regard, nothing in the Board's *Wright Line* decision can be read as requiring the General Counsel to prove, as part of his prima facie case, that an alleged discriminatee was a leader of a union or was more than passively involved in union activities. Rather, the holding in *Wright Line* makes clear that to satisfy the first element of a prima facie case, the General Counsel, as he has done here, need only show that the alleged discriminatee engaged in some concerted activity deemed protected by the Act. Finally, Santiago's conduct in signing a union card, attending Union meetings, and discussing the Union with employees and supervisors alike can hardly be characterized as "limited" protected activity.

Although Respondent claims that it had no knowledge that Santiago was involved in the Union movement (Resp.'s Brief, p. 10), Santiago's comments to Soto, which the Respondent did not challenge -- that he and the other CSOs were planning to unionize because of Respondent's failure to address their work-related issues -- leave no doubt that Soto was made aware of Santiago's pro-Union leanings and sympathies. Soto's knowledge in this regard is properly imputable to the Respondent. *GATX Logistics*, 323 NLRB No. 46, slip op. at 6 (1997). Finally, evidence of Respondent's Union animus can be found in Soto's early June threats to Hernandez. While not alleged as independent violations, Soto's remarks may nevertheless serve as evidence of union animus on the part of the Respondent. *General Films*, 307 NLRB 465, 466 at fn. 2 (1992).[11] Soto's comments clearly reveal the Respondent's displeasure with its employees' decision to bring in the Union, and its intent to retaliate against them for doing so by taking stronger disciplinary measures against them, and by not recognizing the Union until directed to do so in "black in white." Given Respondent's knowledge of Santiago's support for the Union, its threat to retaliate against Union supporters by taking stronger disciplinary measures against them, and the fact that neither Villafañe nor Diaz bothered to investigate the incident before issuing the warning, I find it reasonable to infer that the warning issued to Santiago, just a week or so after Soto made his remarks, was motivated at least in part by antiunion considerations. As the General Counsel has made out a prima facie case, the burden now rests with the Respondent to demonstrate that it would have issued the warning even without regard to Santiago's union activity.[12] The Respondent, in my view, has not done so in this case.

As stated in written warning issued to him, Santiago was purportedly disciplined for having "abandoned [his] post without taking the necessary steps to avoid having the post unattended." It is patently clear, however, and the Respondent does not contend otherwise, that it was Berrios, not Santiago, who had been assigned to guard the P-1 gate on June 14, and that it was he, not Santiago, who left the post unattended to make an emergency trip to the restroom. While it does not dispute the above facts, the Respondent nevertheless claims that Santiago was obligated to assume responsibility for covering the P-1 post on noticing that it had been abandoned by Berrios, and that his failure to do so rendered him as culpable as Berrios, justifying the issuance of warnings to both individuals. However, except for Villafañe's rather dubious assertion that Santiago was required to interrupt or forego his lunch break to provide relief for Berrios, the Respondent produced no evidence such as a Company rule or regulation to substantiate its claim. In fact, Villafañe's testimony that Berrios had the option of simply locking the P-1 gate, notifying Santiago of his actions, and leaving, makes clear that Santiago was not required to be physically present at the gate during Berrios' absence, and was free to keep watch over the gate from the monitor room. Villafañe's testimony thus suggests that the Respondent had no hard and fast rule requiring that a relief guard be physically present at the gate. Consequently, without inquiring from Berrios and Santiago, Villafañe reasonably could not have concluded based only his personal observation of the vacant P-1 post, that Santiago was not covering the gate.

The record, however, makes clear that no such inquiry was made by Villafañe or, for that matter, by Diaz. Thus, Villafañe admits he never asked Santiago what, if anything, he may have said to Berrios about leaving the post, and did not ask Berrios if he had requested

[11] The General Counsel explains in his posthearing brief that he was precluded by Section 10(b) from alleging Soto's remarks as violations in the complaint (GC Brief p. 5, fn. 2).

[12] Contrary to the Respondent, the timing of the June 18, warning, just a month and a half after the May 8, election, and days after the Respondent, through Soto, threatened to take retaliatory measures against employees, support a finding of unlawful motivation.

Santiago to relieve him. Although Diaz did not testify in this proceeding, his post-warning request to Santiago for a written explanation of the June 14, incident, leads me to conclude that he too had not investigated the incident. Without investigating, Villafañe and Diaz could not have known if, as stated in the warning, Santiago had taken "the necessary steps to avoid having the post unattended." The Respondent's failure to investigate the matter, or to afford Santiago an opportunity to explain why the P-1 gate was unattended, before issuing the warning, renders suspect its stated reason for the warning, and gives rise to an inference that the discipline imposed on Santiago may have been motivated by reasons other than the events of June 14. *Paper Mart*, 319 NLRB 9, 10 (1995).[13]

The Respondent's claim that the warning was justified is further undermined by its attempt at the hearing to provide other explanations for the discipline. Villafañe, as noted, explained that Santiago, as the more senior CSO, should have directed Berrios to stay put until relieved, suggesting implicitly that his failure to exercise such authority was a contributing factor in the issuance of the warning. Villafañe, however, did not explain how Santiago would have known he had such authority. In this regard, the Respondent produced no evidence to show that it had a rule granting the more senior CSOs the right to direct less senior CSOs in the performance of their duties, or that the more senior CSOs were ever told they had such authority. More importantly, nothing in the warning indicates that the discipline imposed on Santiago resulted from his alleged failure to direct Berrios to stay put and not leave his post. Accordingly, I place no credence in Villafañe's assertion that Santiago was obligated to direct Berrios to remain at his post, or in his belated assertion that Santiago's failure to do so was a factor in disciplinary warning issued to him.

Villafañe also testified that Santiago was given the warning for violating a Company policy that prohibits individuals from entering onto federal property without prior authorization (see RX-5, p. 12), suggesting implicitly that Santiago inappropriately allowed the messenger entry to the Old San Juan building. This explanation, like the preceding one, is specious and created, in my view, as an afterthought by the Respondent in a desperate attempt to shore up a rather weak defense. Neither the written warning issued by Diaz, nor the counseling letter prepared by Villafañe, makes reference to this alleged breach of policy as a basis for the disciplinary action taken against Santiago. Indeed, Respondent's statement in its posthearing brief (p. 17), that all the reasons for the discipline imposed on Santiago "were included in his written warning," makes clear that this alleged breach of policy, which is not mentioned in the warning, could not have been a factor in the discipline imposed. Further, nothing in Villafañe's (or for that matter Santiago's) testimony as to what transpired at the June 18, disciplinary interview suggests that the subject of the messenger's presence at the Old San Juan building was ever mentioned, much less discussed, by Diaz or Villafañe as a possible violation of Company policy. Indeed, given Villafañe's admission that he did not discuss the June 14, incident with either Berrios or Santiago before the warning, it is reasonable to infer that Villafañe

[13] The Respondent claims that the discipline imposed on Santiago was consistent with that meted out to other employees for similar misconduct. Thus, it claims that in 1993, Hernandez and employee, Carmelo Gines, both were disciplined for abandoning their post (RX-3). Admittedly, RX-3 reveals that Hernandez was in fact disciplined for abandoning his assigned post, as Berrios did in this case. Gines, however, was not disciplined for failing to cover Hernandez' post, but rather for his unauthorized exercise of authority in granting Hernandez permission to leave his post in the first place. Thus, the 1993 incident is factually different from the present case and provides no support for the Respondent's claim that it routinely disciplines both CSOs assigned to the Old San Juan building when one of two is found to have abandoned his post.

likewise made no effort to ascertain if the messenger had in fact been authorized to enter the federal building. Accordingly, I find that the Respondent has not shown that Santiago breached any Company policy against allowing unauthorized individuals to enter federal property, and that it simply concocted this explanation after-the-fact in an attempt to add some legitimacy to the warning issued to Santiago. The Respondent's failure to raise either of the latter two explanations in its posthearing brief suggests that Respondent may have had its own doubts about the legitimacy of its explanations. Where, as here, an employer provides shifting reasons for its actions, a reasonable inference can be drawn that the proffered explanations are mere pretexts designed to mask an unlawful motive. *Trader Horn of New Jersey*, 316 NLRB 194, 199 (1995

Finally, but just as important for purposes of showing the pretextual nature of Respondent's defense, is the fact after issuing the warning, Diaz himself, according to Santiago, expressed the view that the warning had been unjustified. While Santiago's testimony as to what Diaz told him may, on its face, appear to be self-serving, his testimony takes on a credible posture when viewed in light of Villafañe's admission that Diaz wanted the warning expunged from Santiago's file. Clearly, given the sensitive nature of the duties performed by CSOs, it is highly unlikely that Diaz would have sought to remove the warning from Santiago's file had Santiago actually been guilty of the rather serious offense of leaving a secured post unattended.

For all of the above-stated reasons, I conclude that the reasons proffered by Respondent for issuing the warning to Santiago are pretextual, intended to mask some other discriminatory reason. "When an employer's explanations for its actions are pretextual -- that is, if the reasons either did not exist or were not in fact relied upon -- the employer has not met its burden and the inquiry is logically at an end. *Berg Product Design*, 317 NLRB 92, 95 (1995). As the Respondent has failed to rebut the General Counsel's prima facie case, a finding is warranted that the warning issued to Santiago on June 18, was in fact unlawfully motivated by Respondent's desire to retaliate against employees for having brought in the Union, and accordingly violated Section 8(a)(3) and (1) of the Act.

The General Counsel also alleges that Respondent further violated Section 8(a)(3) and (1) by refusing to remove the warning from Santiago's personnel file unless Santiago agreed to delete from the letter he prepared for Diaz certain Union-related language. However, as found above, no such request was made of Santiago. The General Counsel has produced no other evidence to support this particular allegation. Accordingly, I shall recommend that it be dismissed.

2. The Section 8(a)(4) and (1) Allegation

The General Counsel, as noted, amended the complaint at the end of the hearing to allege a Section 8(a)(4) and (1) violation, based on Villafañe's testimony that he dissuaded Diaz from removing the warning from Santiago's file because Santiago had already filed a charge and a complaint had been issued by the Board. While not disputing Villafañe's above testimony, the Respondent nevertheless claims that its conduct was not discriminatory and, if anything, demonstrates Respondent's respect for the Board's processes. I disagree.

Section 8(a)(4) of the Act makes it unlawful for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony" under the Act. As found above, Diaz had every intention of removing the warning from Santiago's file

after becoming convinced that it had been unjustly issued, and from all appearances might have done so but for the fact that, as admitted to by Villafañe, Santiago had proceeded to file his charge with the Board. In these circumstances, there can be no doubt that Respondent's change of heart regarding withdrawal of the warning was retaliatory in nature, and discriminated against Santiago solely because he chose to exercise his statutory right to have the legitimacy of the warning ruled upon by the Board. Accordingly, I agree with the General Counsel and find that the Respondent violated Section 8(a)(4) and (1) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent shall be required, within 14 days of the Order to remove from its files any and all references to the June 18, 1996 written warning issued to Emilio Santiago, including the June 19, 1996, counseling letter prepared by Villafañe, and to notify him in writing, within three days thereafter, that it has done so. The Respondent shall also be required to post an appropriate notice in English and in Spanish.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By issuing a written warning to Emilio Santiago, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

3. By refusing to remove the written warning issued to Santiago because he had filed a charge with the Board, the Respondent violated Section 8(a)(4) and (1) of the Act, and Section 2(6) and (7) of the Act.

4. Except as stated above, the Respondent has not violated the Act in any other manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, General Security Services Corporation, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing a written warning to Emilio Santiago, or to any other employee, because of his support for or involvement with Government Security Officers of America, Local 72, or any other labor organization.

(b) Refusing to remove from its files a written warning issued to Santiago because he had filed a charge with the Board.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Order, rescind and remove from its files any and all reference to the written warning issued to Santiago on June 18, 1996, including the June 19, 1996 counseling letter, and within three days thereafter notify him in writing that it has done so.

(b) Within 14 days after service by the Region, post at its facility in San Juan, Puerto Rico copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 6, 1996.

[15] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

George Alemán
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT issue a written warning to Emilio Santiago or any other employee because of his support for or involvement with Government Security Officers of America, Local 72, or any other labor organization.

WE WILL NOT refuse to remove such written warning from Santiago's personnel file because he filed a charge with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days of this Order remove from our files any and all references to the unlawful warning issued to Emilio Santiago on June 18, 1996, including the June 19, 1996 counseling letter, and WE WILL, within three days thereafter, notify him in writing that we have done so.

GENERAL SECURITY SERVICES CORPORATION

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, La Torre de Plaza, Suite 1002, 525 F. D. Roosevelt Ave., Hato Rey, Puerto Rico 00918–1720, Telephone 787-766-5347.